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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASCENSION HEALTH, Plaintiff, -against- AMERICAN INTERNATIONAL GROUP, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and ACE AMERICAN INSURANCE COMPANY, Defendants.	08-CV-7765 (PGG) (MHD)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS DEFENDANT AMERICAN INTERNATIONAL GROUP, INC.

Defendant American International Group, Inc. ("AIG"), through its attorneys, Nixon Peabody LLP, submits this memorandum in support of their motion to dismiss the complaint as against AIG with prejudice pursuant to Fed. R. Civ. Proc. Rule 12(b)(6).

STATEMENT OF FACTS

Plaintiff Ascension Health ("Ascension") commenced this coverage action by filing a complaint on September 4, 2008, which was amended on March 13, 2009 (the "Complaint").[1] In this action, Ascension sues for breach of contract and seeks a declaration that the defendants are obligated to provide insurance coverage for three underlying class action law suits venued in New York, Michigan and Arizona under several contracts of insurance between Ascension and

[1] *See* Weller Decl. at ¶3; *see also* Complaint, Weller Decl. at Exhibit 1.

National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") and between Ascension and ACE American Insurance Company.[2]

As set forth in the Complaint and admitted, National Union provided directors and officers insurance to Plaintiff Ascension Health during a time period pertinent to this action. Pursuant to the terms and conditions of the insurance contracts, National Union entered into a Directors, Officers and Trustees Insurance and Not-For-Profit-Organizations Reimbursement Policy with Ascension, bearing policy number 528-65-10, with a policy period of November 15, 2004 to November 15, 2005 and a $25 million limit of liability subject to certain sublimits and retentions (the "04/05 Policy").[3] National Union then entered into another insurance contract that was a renewal of the 04/05 Policy, bearing policy number 494-76-96, with a policy period of November 15, 2005 to November 15, 2006 (the "05/06 Policy").[4] National Union did not renew the 05/06 Policy, but instead entered into a replacement, excess, follow-form insurance contract, bearing policy number 965-53-81, with policy period November 15, 2006 to November 15, 2007, with a $15 million limit of liability in excess of $15 million of underlying primary insurance between ACE and Ascension (the "Excess Policy")[5] (the 04/05, 05/06 and Excess Policies are collectively referred to as the "National Union insurance contracts"). National Union has accepted coverage for these underlying class actions under the 04/05 Policy but denied coverage under the 05/06 Policy and the Excess Policy.[6]

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2 *See* Complaint, Weller Decl., Exhibit 1, at ¶¶ 8, 9, 10.

3 *See* 04/05 National Union insurance contract, Weller Decl., at Exhibit D to Exhibit 1.

4 *See* 05/06 National Union insurance contract, Weller Decl., at Exhibit E to Exhibit 1.

5 *See* National Union excess insurance contract, Weller Decl., at Exhibit F to Exhibit 1.

6 *See* Complaint, Weller Decl., Exhibit 1, at ¶ 6.

However, in addition to naming National Union – which has acknowledged that it issued the insurance contracts in question – Ascension also names AIG as a defendant.[7] AIG seeks a dismissal of the claims against it, as National Union, not AIG, issued the insurance contracts in question. Plaintiffs have wholly failed to set forth any facts as to why AIG should be a party to this suit or how it could possibly bear any liable under contracts to which it is not a party. The claims against AIG should be dismissed.

MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes the Court to dismiss an action where it appears from the face of the complaint that the plaintiff has failed "to state a claim upon which relief can be granted." *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). Dismissal under Rule 12(b)(6) may be granted where "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sinha v. New York City Dept. of Educ.*, 2004 U.S. Dist. LEXIS 7081, at *4 (E.D.N.Y. 2004). While it is true that "the court's function on a motion to dismiss is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient," *Festa v. Local 3 International Bhd. of Elec. Workers*, 905 F.2d 35, 37 (2d Cir. 1990), "[a] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (U.S. 2007). Indeed, the Supreme Court has specifically recognized that a party must plead sufficient facts to raise a right to relief. *See id.* at 555-556 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp 235-236

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7 *Id.* at ¶ 7.

(3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

ARGUMENT

The Complaint Fails to State a Cause of Action Against AIG

Plaintiff seeks coverage for three class action lawsuits under insurance contracts it entered into with National Union and ACE. While in its answer National Union admits it is a party to these contracts and issued such policies, the Complaint does not contain any facts or allegations indicating that AIG is a party to any of the insurance contracts or any other basis for AIG's alleged liability under the contracts. Indeed, Ascension's complaint makes almost no factual allegations about AIG at all. Instead, the complaint simply lumps AIG with National Union, referring to "AIG/National Union", implying that they acted collectively, such as "AIG/National Union entered into insurance contracts . . . ," and completely ignores the fact that the only parties to the contracts were Ascension and National Union. *See e.g.*, Complaint at ¶24; *see also* Complaint at ¶¶ 9, 10, 14, 15, 18, 25.

The National Union insurance contracts sued upon in this action are governed by standard contract law in New York. *See Liberty Surplus Ins. Corp. v. Segal Co.*, 142 Fed. Appx. 511 (2d Cir. 2005). Fundamentally, "the essential elements of a breach of contract claim are: (1) the formation of an agreement by an offer, acceptance, and consideration; (2) performance by one party; (3) breach of the agreement by the other party; and (4) damages." *Engler v. Cendant Corp.*, 434 F.Supp.2d 119, 132 (E.D.N.Y. 2006). Ascension does not allege that it entered into an agreement with AIG, doubtless because there was no agreement. Thus, the complaint does

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not satisfy the elements of a breach of contract claim against AIG. Where a defendant is not a party to an agreement that forms the basis for a breach of contract claim, that claim fails as to that defendant.

AIG has in fact been dismissed from a number of suits where it was a stranger to the insurance contract at issue. An identical situation to that presented here was considered by the Court in *Brownyard Corp. v. American Int'l Group, Inc.*, 237 A.D2d 594 (2d Dep't 1997). In *Brownyard,* a New York appellate Court (applying the analogous dismissal provisions of CPLR 3211(7)) held that the trial court had properly dismissed claims against AIG by Brownyard, an insurance agent that developed and marketed liability policies for security guard companies. Brownyard had entered into an agency agreement with National Union, an independent subsidiary of defendant AIG, that granted Brownyard the right to bind and write National Union general liability policies, as well as a contingent commission agreement which provided that Brownyard would be paid a commission on the National Union policies it wrote. AIG moved to dismiss the claims for breach of these agreements on the ground that AIG was not a party to them. Granting the motion, the Court recognized that "there were neither allegations in the complaint nor evidence in the documents submitted in opposition to the motion to dismiss which would support sustaining a cause of action or an alter-ego theory holding AIG, as the parent company of National [Union] . . . liable under the contract." *Id.* at 595.[8] The facts here are the same – no allegations are made in the complaint to support any claim against AIG.

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[8] As in *Brownyard*, here the Complaint does not allege, much less provide factual support for, a claim that National Union is somehow an alter ego of AIG. Indeed, even if one could glean such a contention from the sparsely pled complaint, "[m]ere conclusory statements that an entity is an 'alter ego' of a corporation are insufficient to sustain a cause of action against it." *Abelman v. Shoratlantic Development Co., Inc.*, 153 A.D.2d 821, 823 (2d Dep't 1989).

Likewise, in *Nat'l Recovery Agency, Inc. v. AIG Tech. Servs.*, 2005 U.S. Dist. LEXIS 33913 (M.D. Pa. 2005), a federal district court held that AIG was not liable under an insurance contract issued by Illinois National, a member of the AIG group (like National Union). The *Nat'l Recovery* complaint alleged that AIG was a Delaware corporation authorized to do business in Pennsylvania and an international insurance and financial services organization. The Complaint further alleged that Illinois National was a member company of AIG, that AIG and Illinois National were qualified/authorized to transact business as insurers within Pennsylvania and regularly engaged in the sale of insurance there. Finally, the complaint alleged that AIG and Illinois National were liable for breach of contract, because they had wrongfully denied coverage under the insurance contract at issue. Granting AIG's motion to dismiss, the *Natl. Recovery* Court held that because AIG was not a signatory to the insurance contract, which was issued by Illinois National, AIG could not be liable thereunder. The court held that the complaint failed to state a claim for declaratory judgment, breach of contract or bad faith against AIG, even under relaxed federal pleading rules. *Id.* at *49-*50.

The same analysis applies here – AIG is not a signatory to the National Union insurance contracts, and AIG's relationship to National Union could not provide a basis for liability. *See also, Randolph Equities, LLC v. Carbon Capital, Inc.*, 2007 U.S. Dist. LEXIS 21670 (S.D.N.Y. 2007) (defendant's motion to dismiss granted where the complaint failed to allege facts sufficient to show that defendant had entered into an agreement with the Plaintiffs); *Jurupa Valley Spectrum, LLC v. Nat'l Indem. Co.*, 555 F.3d 87, 90 (2d Cir. 2009) (Second Circuit granting claims administrator National Liability & Fire Insurance Company's motion to dismiss the claims against it because the plaintiff failed to allege the existence of a valid contract with National Liability).

Indeed, numerous New York Courts have recognized the fundamental principal that "liability of the parent company for the contractual obligations of its subsidiary may not be imposed." *Town of Smithtown v. National Union Fire Ins. Co.*, 191 A.D.2d 426, 426 (1st Dep't 1993). In *Smithtown*, the plaintiff sought a declaration that the defendants owed them coverage for four underlying law suits against it, for which the defendants had disclaimed coverage. *Id.* Plaintiff named National Union, the issuer of the policy in question, and its parent company, AIG. *Id.* AIG subsequently sought summary judgment in its favor since it did not issue the insurance policy. *Id.* The Court granted summary judgment to AIG, finding that

> the contract of insurance was entered into by the Town of Smithtown and the National Union Fire Insurance Company and that the plaintiffs have failed to allege or tender proof that the parent company, American International Group, Inc., exercised completed dominion and control over National Union Fire Insurance Company in this matter. Thus, liability of the parent company [AIG] for the contractual obligations of its subsidiary may not be imposed.

Id. [9]

Numerous other courts have similarly dismissed claims against strangers to insurance contracts. For example, in *Denkewalter v. Wolberg*, 82 Ill.App.3d 569 (Ill. 1980), an Illinois appellate court granted defendant insurer's motion to dismiss, holding that even when viewed in a light most favorable to the plaintiffs, the complaint failed to alleged facts disclosing the existence of any contractual relationship between plaintiffs and appellees . . . ." *Id.* The Court reasoned that the pleadings lacked factual allegations necessary to establish the existence of any offer, acceptance or consideration. *Id.* Further, the Court pointed out that the plaintiffs did not allege that they ever discussed any aspect of insurance coverage with the defendant insurer. *Id.*

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[9] *See also Heritage Corp. v. Nat'l Union Fire Ins. Co.*, 580 F. Supp. 2d 1294, 1304 (S.D. Fla. 2008) (granting AIG's motion for summary judgment in part because it was not a signatory to insurance contracts issued by National Union); *Habecker v. Peerless Ins. Co.*, 2008 U.S. Dist. LEXIS 92894 (M.D. Pa. 2008) (granting summary judgment to Liberty Mutual, as it was only the parent company to Peerless and was not a party to the Peerless policy); *Johnson Landscapes, Inc. v. FCCI Ins. Co.*, 2007 U.S. Dist. LEXIS 88859 (N.D. Ga. 2007) (holding that insurer is entitled to summary judgment because it was not a party to its sister insurance company's policy and "it cannot be held liable for the breach of a contract to which it was not a party and did not assent."); *but see Warnaco Inc. V. VF Corporation*, 844 F.Supp. 940, 946 (S.D.N.Y. 1994) (denying motion to dismiss where, unlike here, detailed factual allegations were made as to the alleged basis for liability of party seeking dismissal).

In point of fact, AIG is simply a holding company. AIG and National Union are two separate legal entities that maintain separate and distinct identities.[10] National Union and AIG are organized under laws of different states and are thus regulated by different state's insurance regulators.[11] In fact, Ascension is well aware that they are separate and distinct entities, having served AIG and National Union separately,[12] evidenced by the proof of service of the original complaint on them at their respective, separate places of business.[13]

As in the cases discussed above, there have been no facts or allegations pled suggesting that AIG had any role in the negotiation or issuance of the National Union insurance contracts, or exercised any dominion or control over National Union. National Union alone undertook the defined risks in the contracts entered with plaintiff. No cause of action can be stated against AIG for breach of contracts to which it is a stranger, and it should be dismissed from this action.

CONCLUSION

For the reasons set forth herein, AIG respectfully requests that this Court dismiss the claims against it in this action.

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10 See Weller Decl. at ¶¶ 9-10.

11 *Id.*

12 *Id.* at ¶ 10.

13 *Id.*

Dated: Jericho, New York
April 17, 2009

By: _/s/_______________________________
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